NO. 91-1488

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

JEFFREY G. RUSS AND SHANNON C. RUSS
Petitioners

VERSUS

INTERNATIONAL PAPER COMPANY
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether summary judgment can be granted when the opposing party is never given notice of the grounds of the motion, or put in another way, whether a District Court can grant summary judgment on grounds not advanced by the moving party.

II. Whether a District Court can grant summary judgment for defendant on the issue of liability, relying solely on conclusory assertions by defendant in a reply memorandum that plaintiff has no evidence to prove his case, when the record is devoid of evidence. As a corollary, whether the district court can shift the burden of proof in a summary judgment on the issue of liability to plaintiff by requiring that plaintiff put on a prima facie case, even though defendant has not proven that no material facts are at issue.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

JEFFREY G. RUSS AND SHANNON C. RUSS
Petitioners

versus

INTERNATIONAL PAPER COMPANY
Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioners, Jeffrey G. Russ and Shannon C. Russ, request that a Writ of Certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, (Appendix A, infra) is reported at 943 F.2d 589. The dissenting opinion of Roney, Senior Circuit Judge, is reported at 943 F.2d 593, 594. Petitioners application for rehearing was denied on November 13, 1991.

JURISDICTION

(i) The decision of the United States Court of Appeals for the Fifth Circuit of which petitioners seek review was rendered on October 7, 1991.

(ii) The order of the United States Court of Appeals for the Fifth Circuit denying petitioner's request for a rehearing was rendered on November 13, 1991.

(iii) The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

On April 8, 1989, Jeffrey Russ was a twenty-three year old electrician's helper employed by BM Electric, Inc. [hereinafter referred to as "BM"] working at the International Paper Company [hereinafter referred to as "IP"] plant in Natchez, Mississippi. BM was an independent contractor hired to install motors on progammable controllers.

Russ was working in a room owned and operated by IP. While performing wire installation on a cabinet, he was enveloped by a ball of fire originating from another area, causing third and fourth degree burns over eighty percent of his body. He suffered the loss of his ears and fingers, and has had to undergo numerous surgeries to replace skin on his body.

Russ was not shocked or electrocuted, but rather burned. Preliminary opinions submitted by experts employed by plaintiffs indicated the fire was occasioned by an accumulation of airborn industrial waste.

Suit was filed against IP in the United States

District Court for the Southern District of Mississippi, Western Division, Civil Action No. W-89-0040(B), jurisdiction being based on diversity of citizenship. After taking plaintiff's deposition, IP filed for summary judgment on December 22, 1989, asserting that plaintiff's employer had control of the work place and had been warned of the existence of electrical current in the area where plaintiff was injured, thus exonerating it from liability. IP relied solely on plaintiff's deposition, with no additional evidence being supplied. Plaintiff filed an opposition memorandum with a supporting affidavit, showing that plaintiff's employer did not have exclusive custody of the work place, and there was no showing that plaintiff was injured by being in contact with electrical current. Then, in a reply memorandum, IP brought up for the first time that plaintiffs had failed to put on a prima facie case such that liability could ultimately be proven against it.

In its decision, the District Court agreed with plaintiffs' defense to the original motion for summary judgment, but granted it based on plaintiffs' failure to prove a prima facie case, which had been brought up for the first time in the reply memorandum. Plaintiffs filed a motion for reconsideration, rehearing, and for leave to file additional evidence on March 21, 1990, in that plaintiffs had not been put on notice that causation and negligence of IP was an issue at the original hearing, but said motion was denied on May 23, 1990. Plaintiff filed a timely notice of appeal on June 4, 1990.

On October 7, 1991, in a two to one decision, the panel of the Fifth Circuit Court of Appeals affirmed the trial court's grant of summary judgment. The majority held that IP had given adequate warning of hazards of high voltage electricity to plaintiff's employer, despite a record that was devoid of such evidence. In a strong dissent,

Senior Circuit Judge Roney, sitting by designation, asserted that plaintiffs were never given adequate notice that causation was an issue, thus plaintiffs were not required to put on a prima facie case. The dissenting opinion held that

> **"Only in defendant's reply to the plaintiffs' response did the defendant suggest that the record did not contain evidence to support the plaintiffs' view."**

Thus, the raising of that argument in the reply memorandum did not give plaintiffs proper notice and was in direct violation of the law in the Fifth Circuit Court of Appeals and the United States Supreme Court. It further deprived plaintiffs of due process of law, as required by the Federal Rules of Civil Procedure.

ARGUMENT

I. WHETHER SUMMARY JUDGMENT CAN BE GRANTED WHEN THE OPPOSING PARTY IS NEVER GIVEN ADEQUATE NOTICE OF THE GROUNDS OF THE MOTION, OR PUT ANOTHER WAY, WHETHER A DISTRICT COURT CAN GRANT SUMMARY JUDGMENT ON GROUNDS NOT ADVANCED BY THE MOVING PARTY.

International Paper Company filed a motion for summary judgment, relying on the deposition of Jeffrey Russ, the complaint filed by plaintiffs, the contract between IP and BM, and a motion for protective order filed by plaintiffs (see Notice of Filing Exhibits by IP). The latter three exhibits provided no information relative to the cause of the accident. Thus, the only evidence in the record at the time the motion for summary judgment was granted was

the deposition of Jeffrey Russ. The motion rested on two grounds:

First, that IP could not be liable to Russ, in that he was injured while repairing a cabinet in the electrical center, which was under the control of the independent contractor BM at the time. An affidavit submitted by Bub Mullins, owner of BM, showed that neither BM nor Russ was in the process of performing repairs on the cabinet in question, and the area was not under the exclusive control of BM. The district court agreed with plaintiff.

The court further suggested on its own that there was some question as to whether or not BM was given authority by IP to decide whether the electrical current in the area would continue to be supplied to the cabinet where Russ' injury occurred. The court stated as follows:

> **"If BM was not in fact allowed to have the current temporarily shut off as work progressed, defendant might indeed be subject to liability for the damage incurred by plaintiff."**

On this basis alone, the court found a viable cause of action against IP for negligence, based on the record before it, however sparse.

In the second part of its motion, IP discussed in two short paragraphs that Russ was **"obviously injured by the electric current in the center and in the cabinet."** No evidence was introduced to support this contention.

IP then asserted that once Russ was warned that electricity existed in the cabinet, IP could not be liable. *Mississippi Chemical Corporation v. Rogers,* 368 So.2d 228, 222 (Miss. 1979). However, this warning would not insulate the defendant from liability, if the high voltage cur-

rent was not the sole and direct cause of plaintiff's injuries. In other words, if plaintiff were warned that an electrical current was in the area, and touched the current in spite of the warning, IP would have had a reasonable argument, although there would then be the question of whether or not the current should have been shut off at the outset. IP's suggestion to the court that plaintiff was adequately warned has to be backed up by a factual presentation in the record. In order to prevail on a summary judgment, IP would have had to show that there was no genuine issue as to any material fact. *Celotex Corporation v. Catrett*, 106 Sup. Ct. 2548, 2553 (1986). The *only* evidence in the record was the deposition of Jeffrey Russ. The cited paragraph in his deposition is instructive.

"**Question:** **Jeff, do you have any idea how this accident happened?**

Answer: **No.**

Question: **Do you recall doing anything that could have caused or contributed to this accident?**

Answer: **Uh uh. Because all I was doing was putting a piece of flex in and everything went haywire I reckon.**

Question: **Do you recall anything that happened right before the explosion, anything out of the ordinary?**

Answer: **There was no explosion it was just everything went a bright orange, lets put it that way.**

Question: **There was flash?**

Answer: **I reckon so, all I know is everything turned bright orange, when it was over, I was on fire."** (Record, page 79)

This testimony does not indicate at all that Russ was injured by electrical current. He stated quite clearly that he did not know what happened (Record, Page 149). And, he states that his own activities had nothing to do whatsoever with the source of the fire, since he was working away from where the fire emanated.

Further, Russ stated in his deposition that although he was told electrical current was present at the *back* of the box, it was not present where he was working. (Record, Pages 134, 143-144). Not one single shred of testimony in the record indicates either the cause of the fire or that Russ was warned of its existence.

On this record alone, it is apparent that IP was deficient in putting forth its theory that the warning given Russ was adequate. It is difficult to believe that Russ was told that he could be enveloped by a ball of fire at any moment if he worked in that area. IP would dare not make such an argument.

It is certain that had the district court applied the proper standard in evaluating IP's summary judgment, the motion would not have been granted. However, the court rendered judgment on an issue that had been brought up in defendant's reply memorandum for the first time: causation of the accident. The original motion for summary judgment filed by IP never mentioned that it was moving for summary judgment on the grounds that plaintiff could not prove his alleged cause of injury, as was the case in *Celotex*. Only in defendant's reply to the plaintiffs' response did the defendant suggest that the record did not contain evidence

to support a prima facie case of negligence against IP. The reply memorandum states as follows:

> **"In his response to the motion for summary judgment, Russ has wholly failed to make out a prima facie case of negligence against International Paper Company, and therefore summary judgment for International Paper Company is proper."**

As recognized in the dissent by Judge Roney, this was the first time that the question of causation was brought up. Had plaintiff been given the opportunity to reply to this assertion in its proper form, the response would have been similar or identical to the memorandum and supporting affidavits in the motion for reconsideration, which was in fact nothing more than a reply to defendant's reply memorandum.

In *John Deere Company v. American National Bank, Stafford,* 809 F.2d 1190 (5th Cir. 1987), the Fifth Circuit had already disapproved such a procedure in granting summary judgent.

> **"Since the district court relied on grounds not advanced by the moving party as a basis for granting summary judgment, it did not give proper notice to (the non-moving party) before granting judgment on such grounds, its judgment cannot be upheld on appeal. This court has strictly applied the procedural safeguards of FRCP 56 and has therefore held that a district court may not grant summary judgments *sua sponte* on grounds not requested by the moving party. *Capital Films Corporation v. Charles Fryes Productions,* 628 F.2d 387, 390-391 (5th Cir. 1980); *Sharlitt v. Gorinstein,* 535 F.2d 282, 283 (5th Cir. 1976). Since the district court's grant of summary judgment was**

> **not based on grounds advanced by the bank, and no opportunity was given to John Deere to respond, we must reverse."**

The decision in the instant matter is directly violative of the United States Supreme Court's decisions in *Celotex* and *Adickes v. S.H. Kress & Company,* 398 U.S. 144 (1970) which require that the plaintiff be put on notice that the defendant is challenging the sufficiency of evidence to support a verdict. It is improper to allow the mechanism of summary judgment to become one of surprise and misuse. The plaintiff in this matter asks only to be given an opportunity to be heard, with fair and adequate notice, as required by the Federal Rules of Civil Procedure.

The dissent by Judge Roney is important. If Judge Roney, who is a senior circuit judge, with a long history of judicial experience, does not feel that plaintiff was given adequate notice as to the grounds of IP's motion for summary judgment, it can surely not be said that undersigned counsel have would interpretted that motion any other way. The question of whether a non-moving party has adequate notice should be strictly construed, as stated in *John Deere.*

It is believed that this new method of presenting issues to the district court in a reply memorandum is a substantial breach of the basic tenets of the Federal Rules of Civil Procedure. Its potential for abuse is enormous, as in any motion that were to be filed in any district court, counsel would have to be prepared to put on all of its evidence at that point, even if it was not brought into issue, for fear that a mere mention in a reply memorandum would result in the case being dismissed. Accordingly, the only recourse for Russ in this matter is a grant of certiorari, so that this can be stopped.

II. WHETHER A DISTRICT COURT CAN GRANT SUMMARY JUDGMENT FOR DEFENDANT ON THE ISSUE OF LIABILITY, RELYING SOLELY ON CONCLUSORY ASSERTIONS BY DEFENDANT IN A REPLY MEMORANDUM THAT PLAINTIFF HAS NO EVIDENCE TO PROVE HIS CASE, WHEN THE RECORD IS DEVOID OF EVIDENCE. AS A COROLLARY, WHETHER THE DISTRICT COURT CAN SHIFT THE BURDEN OF PROOF IN A SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY TO PLAINTIFF BY REQUIRING THAT PLAINTIFF PUT ON A PRIMA FACIE CASE, EVEN THOUGH DEFENDANT HAS NOT PROVEN THAT NO MATERIAL FACTS ARE AT ISSUE.

As indicated above, plaintiff was never put on notice that causation of Russ' injuries were at issue. That aside, the standard for granting summary judgment where a moving party contends that a plaintiff has no evidence to support his or her claim is different from other types of summary judgment. To be sure, a conclusory assertion that the non-moving party has no evidence is insufficient. *Celotex* at 2557; *Galindo v. Precision American Corporation*, 754 F.2d 1212, 1221 (5th Cir. 1985).

The guiding cases in this area, *Celotex* and *Adickes*, supra, require that the plaintiffs be put on notice that defendant is challenging the ability to put on a prima facie case at trial. In *Celotex* and *Adickes*, plaintiffs were put on notice on a number of occasions. In the instant matter, no such call was made. At no time in its original memorandum for summary judgment did IP suggest that plaintiff would be unable to prove a prima facie case at trial, or call into question plaintiff's ability to do so at some point. This excerpt from IP's reply memorandum is telling:

> **"Finally, the plaintiff in this case, although the non-moving party, nonetheless has the burden of proof for trial as to how the accident happened, the negligence of IP Company and the cause of his injuries. In his response to the motion for summary judgment, Russ has wholly failed to make out a prima facie case of negligence against International Paper Company, and therefore summary judgment for International Paper Company is proper. *Celotex Corporation v. Catrette,* 477 U.S. 317 322-323 (1986)"** (International Paper Company's Rebuttal Memorandum in Support of its Motion for Summary Judgment)

This contention in IP's "reply" memorandum was exactly the rationale the court gave for granting the motion for summary judgment. Even IP recognized in its memorandum that the burden of proof was on plaintiffs "at trial" to prove negligence and the cause of Russ' injuries. Thus, as stated by Judge Roney in his dissenting opinion, the burden of proof was put on plaintiff to support its theory, when defendant did not prove, as required under the Federal Rules of Civil Procedure, that no material facts remained at issue. Judge Roney noted in his dissent that plaintiffs' response to defendant's motion for summary judgment addressed only the arguments advanced by defendant, and did not discuss the question of causation of plaintiff's injuries, as this was presented for the first time in the reply memorandum.

It is suggested that this shift of the burden of proof to the non-moving party in a motion for summary judgment, when mover has not met its burden of proving that there are no material facts at issue, is a material change in the Federal Rules of Civil Procedure that warrants a grant of certiorari. The *moving* party must demonstrate affirmatively that there is no genuine issue of material fact. In

this particular instance, the only evidence in the record at all was the deposition of plaintiff, who stated that he did not know how the accident happened. This Court has already expressed an opinion on this issue in *Celotex*, by stating that had plaintiff listed *one* witness to support her claim, summary judgment would not have been granted without Celotex somehow showing that the named witness' possible testimony raised no genuine issue of material fact. *Celotex* at 2555, 2558. Thus, *Celotex* tells us that if a non-moving party lists a witness who would provide relevant testimony for a non-moving party at trial, the court cannot find that the moving party has discharged its burden of proof, and summary judgment should be denied.

In the instant matter, IP hardly discharged any burden whatsoever. The only evidence on record was plaintiff's deposition. Yet, the appellate panel in Russ states that the burden was on Russ to show that his injuries were not the result of the mishandling of the electrical current he knew was present. *Russ* at 70. This statement shows that the burden of proof was put on Russ, as opposed to IP. (Record, Page 149).

Judge Roney certainly felt that defendant failed to point to a record that showed without question that plaintiff was injured by high voltage current alone. *Russ* at 71. In addition, Justice White, who supplied the majority's fifth vote in *Celotex*, noted in his concurring opinion that:

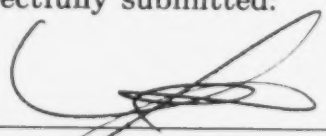
> **"It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that plaintiff has no evidence to prove his case." *Celotex*, 477 U.S. at 328, 106 Sup. Ct. at 2555 (White, J., concurring).**

Thus, the burden of proof required by the district

court in Russ is in direct conflict with the Supreme Court decisions of *Celotex* and *Adickes*, and the Fifth Circuit opinions in *Galindo* and *John Deere*. It is essential to a granting of summary judgment that there be a record indicating that there are no material facts at issue. In this matter, the district court itself recognized in its opinion that IP could be liable for failing to have the current turned off before Russ worked in the area.

To allow this decision to stand would set a dangerous precedent within the federal system. A plaintiff or defendant could move for summary judgment without any record whatsoever, putting the other party at risk if it does not come forward with every available piece of evidence extant. This untenable shifting of the burden of proof in summary judgment when mover has not met its burden conflicts directly with the law in the United States Supreme Court, thus depriving plaintiff of due process of law.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I, LEONARD A. RADLAUER, hereby certify that I have on February 6, 1992, by United States Mail, postage pre-paid, served three (3) copies of the foregoing petition upon all parties required to be served, their names and address being as follows:

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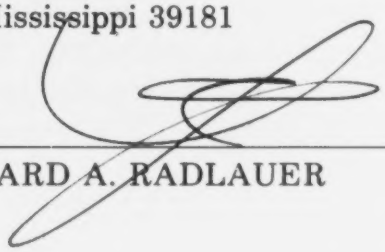

LEONARD A. RADLAUER

APPENDIX "A"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JEFFREY G. RUSS AND
SHANNON C. RUSS PLAINTIFF

VS. CIVIL ACTION NO. W89-0040(B)

INTERNATIONAL PAPER COMPANY DEFENDANT

MEMORANDUM OPINION AND ORDER

This cause is before the Court on the Motion of Defendant International Paper Company for Summary Judgment. Having reviewed the Motion together with supporting and opposing memoranda and other documents, the Court finds the Motion to be well taken and accordingly will grant summary judgment in favor of Defendant.

I. FACTS

International Paper Company ("International Paper"), a New York corporation, entered into a contract with BM Electric Company ("BM") to perform certain electrical contracting work at a mill in Natchez, Mississippi owned by International Paper. Plaintiff Jeffrey Russ ("Russ"), a resident of Mississippi, was employed by BM.

On April 8, 1989, Russ was attaching pipe to an electrical cabinet in the International Paper mill. Russ' work on the cabinet was being supervised by a foreman employed by BM. The cabinet continued to function as part

of the mill while Russ was working. Russ was warned by the foreman about the danger of high voltage in the cabinet. As Russ was reaching into the cabinet to turn the screw on a portion of pipe, an electrical flash or explosion occurred which severely burned Russ.

II. PROCEDURAL HISTORY

On April 17, 1989, Jeffrey Russ and his wife Shannon Russ, also a resident of Mississippi, filed suit against International Paper in this Court, alleging that Jeffrey Russ had been injured as a result of the negligence of Defendant and had suffered permanent disfigurement, loss of wage earning capacity, permanent disability, and diminution of his quality of life and that Shannon Russ had suffered loss of consortium. Plaintiffs seek judgment against Defendant in the amount of $15,000,000.00. The jurisdiction of the Court is founded upon diversity of citizenship and the amount in controversy pursuant to 28 U.S.C. §1332.

Defendant filed the instant Motion on December 26, 1989.

III. CONCLUSIONS OF LAW

Rule 56 of the Federal Rules of Civil Procedure states in relevant part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56 (c). As the United States Supreme Court has made clear,

> the plain language of Rule 56(c) mandates the entry of the summary judgment, after adequate

> time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The evidence before the Court clearly indicates that there is no genuine issue as to at least one essential element of Plaintiffs' case. Accordingly, summary judgment will be issued in favor of Defendant.

Defendant has asserted that it cannot be liable to Plaintiffs because BM, the independent contractor which employed Jeffrey Russ, had control over the electrical cabinet on which Russ was working. Thus, according to Defendant, since Russ' injury was intimately connected with the work which BM had contracted to do, Defendant, as the owner of the premises, is not responsible. *Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So. 2d 182 (Miss. 1989); *Fortenberry Drilling Co., Inc. v. Mathis*, 391 So. 2d 105 (Miss. 1980). As the Court in *Magee* stated,

> [w]here a party . . . contracts with another . . . to perform original construction or repair work . . . and devolves upon the contractor the right and fact of control of the premises and the nature and details of the work, the owner has no liability for injuries experienced by the contractor's workers where those injuries arose out of or were intimately connected with the work.

551 So. 2d at 185. However, the *Magee* Court also cautioned that

> [t]his is not to say that in cases like this the plaintiff may never win. If he can show that, the con-

> tract notwithstanding, the owner maintained substantial de facto control over those features of the work out of which the injury arose, we may have a horse of a different color. And if he can generate a genuine issue of material fact with due regard for the strictures of Rule 56(c) and (e), he may survive summary judgment.

Id. at 186.

The Court finds that there exists a genuine issue in the instant case with regard to whether Jeffrey Russ' employer, BM, had complete control over the features of Russ' work out of which his injury arose, or whether Defendant retained considerable control over those features. In particular, the Court notes that there is some question with regard to whether BM was given authority by Defendant to decide whether electrical current would continue to be supplied to the cabinet where Russ' injury occurred while Russ and others worked on it. If BM was not in fact allowed to have the current temporarily shut off as work progressed, Defendant and not BM might indeed be subject to liability for the damages incurred by Plaintiffs.

The Court therefore finds that since there is a genuine issue regarding whether BM had complete control over the premises where Russ was working, the Court must assume for purposes of this Motion that BM did not have that measure of control. Accordingly, the Court must assume as well that Defendant owed that duty to Jeffrey Russ which is owed by any owner to a business invitee, namely the duty to furnish a reasonably safe place to work or to give warning of danger. *Mississippi Chemical Corp. v. Rogers,* 368 So. 2d 220, 222 (Miss. 1979). However, Plaintiffs have failed to make even a prima facie case that Defendant has breached this duty. It is undisputed both that BM

was aware of the high voltage present in the cabinet and that Russ was warned of this danger, and Plaintiffs have not produced a shred of evidence that Russ' injury was caused by or related to some other or greater source of danger. In particular, Plaintiffs' theory that the accident resulted from a discharge or arcing of electricity due to surface contamination of the cabinet by airborne industrial fly or waste is not supported by the evidence necessary to survive summary judgment.

Rule 56(e) states in part that

> [w]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

Rule 56(e) also provides that

> [s]upporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.

Plaintiffs, on the contrary, have attempted to survive summary judgment by submitting an affidavit which clearly fails to meet the requirements of Rule 56(e). The affidavit, which advances the theory noted *supra* that the accident was caused by an electrical discharge or arcing, is that of

a purported expert, John T. Butters, whose only stated qualification is the title of "Professional Engineer," which does not alone indicate to the Court a competency to testify in an expert capacity. Furthermore, Plaintiffs have failed to submit sworn or certified copies, or indeed any copies at all, of "data" supplied to Mr. Butters by Plaintiffs' attorney and upon which Mr. Butters has relied in his affidavit. Finally, Mr. Butters has failed to affirmatively state that the discharge or arcing caused by surface contamination was a definite or even probable cause of the accident which caused Russ' injury, but instead has stated that his "preliminary opinion may be modified and amplified pursuant to the study of additional pertinent data as it becomes available."

Thus, Plaintiffs, by failing to show a breach by Defendant of the duty of care owed to them, have "fail[ed] to make a showing sufficient to establish the existence of an element essential to [their] case." *Celotex*, 477 U.S. at 322. Summary judgment must be entered against them.

IT IS THEREFORE ORDERED that the Motion of Defendant for Summary Judgment is hereby granted. All claims of Plaintiffs against Defendant are hereby dismissed with prejudice.

SO ORDERED this the 8th day of March, 1990.

_____

CHIEF JUDGE

JUDGMENT

In accordance with the Memorandum Opinion and Order entered this day in this cause, all claims of Plaintiffs Jeffrey G. Russ and Shannon C. Russ against Defendant International Paper Company are hereby dismissed with prejudice at the cost of Plaintiffs.

SO ORDERED this the 8th day of March, 1990.

_____

CHIEF JUDGE

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

JEFFREY G. RUSS AND
SHANNON C. RUSS PLAINTIFFS

VS. CIVIL ACTION NO. W89-0040(B)

INTERNATIONAL PAPER COMPANY DEFENDANT

ORDER

This cause is before the Court on the Motion of the Plaintiffs for Rehearing and Reconsideration of the Opinion and Order of the Court entered March 8, 1990, in which the Court granted the Motion of the Defendant for summary judgment, and for Leave to File Additional Evidence in opposition to that motion. The Defendant has responded to the Motion, and the Court, having considered the Motion, together with memoranda of authorities and attachments thereto, is of the opinion that the Motion of the Plaintiffs is without merit and should be dismissed.

The Motion for Rehearing, etc. apparently is not filed pursuant to any provision of either the Federal Rules of Civil Procedure or the Uniform Local Rules of the United States District Courts for the Northern and Southern Districts of Mississippi. Plaintiffs have presented no newly discovered evidence which would warrant a reconsideration of the Memorandum Opinion and Order of this Court issued on March 8, 1990, nor have Plaintiffs pointed to any element either of fact or of law which was not before this

Court at the time of the initial consideration by this Court of the Motion of Defendant for Summary Judgment. In essence, Plaintiffs have merely attempted to re-argue the Defendant's Motion for Summary Judgment. Such activity is unwarranted by any rule, written or otherwise, governing procedure in this Court.

If this Motion is being brought under rule 59(e), it is improper. As another district court has stated in regard to Rule 59(e),

> [t]he plaintiff in his brief brings forward no matter that could not have been argued before judgment was entered herein. His brief in support of his motion is no more than an expression of a view of the law contrary to that set forth in the Court's opinion. Whatever may be the purpose of Rule 59(e) it should not be supposed that it is intended to give an unhappy litigant one additional chance to sway the judge.

Durkin v. Taylor, 444 F. Supp. 879, 889 (E.D. Va. 1977). Similarly, there is no reason why Plaintiffs should be given another opportunity to argue a Motion granted by this Court.

The Court notes here for the benefit of Plaintiff's counsel and for purposes of clarification, that it, as have other courts in context of Rule 59(e) motions, recognizes only three possible grounds for any motion for "reconsideration," whether designated a Rule 59(e) motion or otherwise: (1) an intervening change in controlling law, (2) the availability of new evidence not previously available, and (3) the need to correct a clear error of law or prevent manifest injustice. *Natural Resources Defense Council v. United States Envtl. Protection Agency*, 705 F. Supp. 698, 702 (D.D.C.), *vacated on other grounds*, 707 F. Supp. 3

(D.D.C. 1989). With regard to this third ground, the Court cautions that any litigant considering bringing a motion to reconsider based upon that ground should evaluate in the light of Rule 11 of the Federal Rules of Civil Procedure whether what may seem to be a clear error of law is in fact simply a point of disagreement between the Court and the litigant. A Rule 59(e) motion would be proper, for example, where "the Court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the Court by the parties, or has made an error not of reasoning but of apprehension. A further basis for a motion to reconsider would be a controlling or significant change in the law or facts since the submission of the issue to the Court." *Johnson v. City of Richmond,* 102 F.R.D. 623-24 (E.D. Va. 1984), quoting *Above The Belt, Inc. v. Mel Bohannan Roofing, Inc.,* 99 F.R.D. 99 (E.D. Va. 1983).

For the foregoing reasons the Court is of the opinion that the Motion of the Plaintiffs is not a proper one under the Federal Rules of Civil Procedure. Accordingly, rather than to deny the motion, it is proper to dismiss it.

IT IS SO ORDERED, this 23rd day of May, 1990.

_____

CHIEF JUDGE

APPENDIX "C"

Jeffrey G. Russ and Shannon C. Russ,
Plaintiffs-Appellants,
v.

International Paper Company,
Defendant-Appellee.

No. 90-1445

United States Court of Appeals,
Fifth Circuit.

October 7, 1991

Electrician and his wife brought personal injury action against plant owner. The United States District Court for the Southern District of Mississippi, William Henry Barbour, Jr., Chief Judge, granted plant owner's motion for summary judgment, and electrician and his wife appealed. The Court of Appeals held that electrician's affidavits were insufficient to defeat plant owner's motion for summary judgment based on warnings which it had given to the electrician's employer.

Affirmed.

Roney, Senior Circuit Judge, sitting by designation, filed a dissenting opinion.

1. Federal Civil Procedure 2544

Simply filing summary judgment motion to come forward with evidence demonstrating material issues of

fact as to every element of its case; moving party must first satisfy its obligation of demonstrating that there are no factual issues warranting trial.

2. Federal Civil Procedure 2544

Where plant owner pointed to two issues which were established in the record and which could be considered dispositive of an electrician's personal injury claim, i.e., that electrician's employer had control of area where electrician was working and that the plant owner had given adequate warning to electrician's employer, electrician had an obligation to go beyond the pleadings in order to avoid summary judgment.

3. Federal Civil Procedure 2515

Affidavits indicating that an electrician's injuries could have been caused by an electrical discharge which resulted from service contamintion which had accumulated in the area of the plant in which he was working did not preclude summary judgment based on plant owner's showing that it had given adequate warning of hazards of high voltage electrical discharge to the electrician's employer.

4. Federal Civil Procedure 2655

Plaintiffs were not entitled to reconsideration of defendant's motion for summary judgment where affidavit which they offered in support of their motion for reconsideration was given by a person who has been designated as an expert prior to the entry of summary judgment and there was no showing that the affidavit was unavailable when it should have been presented.

Appeal from the United States District Court for the Southern District of Mississippi.

Before, CLARK, Chief Judge, RONEY and DUHE, Circuit Judges.

PER CURIAM:

In this diversity suit based on injuries suffered in a workplace accident, the district court granted summary judgment to the defendant International Paper Company (I.P.) on the ground that the plaintiffs had failed to produce evidence to substantiate the theory of causation they suggested in response to I.P.'s summary judgment motion. Plaintiffs appeal the district court's grant of summary judgment and denial of a motion to reconsider. We affirm.

I.

On April 8, 1989, plaintiff Jeffrey Russ, an electrician's helper, was working at a mill owned by I.P. in Natchez, Mississippi. At the time, plaintiff was employed by B.M. Electric Company (B.M.), an independent contractor, retained by the defendant to perform installation work within the plant. While plaintiff was installing a portion of a new equipment in an electrical cabinet he was "injured by the electrical current" and suffered severe burns over most of his body.

Russ and his wife, citizens of Mississippi, brought suit against I.P., a New York corporation, on April 17, 1989, alleging that Russ had been injured as a result of defendant's negligence. The plaintiffs alleged that Russ's injuries had been caused by "a fireball which was created as a result of the negligence of the defendant, [I.P.]." I.P. moved for summary judgment arguing that it was not

liable for Russ's injuries because it had warned both Russ and his employer about this dangerous condition. The district court granted summary judgment for the defendant.

II.

Although Mississippi law controls the substantive aspects of this diversity case, *Erie Railroad v. Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), federal law controls the procedural aspects. *Hanna v. Plumer,* 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965); *Phillips Oil Co. v. OKC Corp.,* 812 F.2d 265, 272 n. 12, cert. denied, 484 U.S. 851, 108 S.Ct. 152, 98 L.Ed.2d 107 (1987). In federal court, summary judgment is appropriate when, after a review of the record, the court determines that there are no genuine issues of material fact and the movant is entitled to a judgment as a matter of law. FED.R.CIV.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). When reviewing the pleadings, depositions, admissions, answers to interrogatories, and affidavits, the court must draw all reasonable inferences in favor of the non-moving party. *Randolph v. Laeisz,* 896 F.2d 964, 969 (5th Cir. 1990) (citing *Reid v. State Farm Mut. Auto. Ins. Co.,* 784 F.2d 577, 578 (5th Cir. 1986)).

In this case, the defendant's motion claimed that summary judgment was appropriate because of two distinct material facts asserted to be controlling and not challenged in the record. First, the defendant maintained that control over the area in which plaintiff was working had been surrendered to the subcontractor, plaintiff's employer, and thus defendant could not be held responsible for any injuries occurring while the area was under the control of another party. The district court concluded that there were genuine issues of material fact concerning the

subcontractor's control of the area which would prevent the entry of summary judgment in defendant's favor on that ground.

Second, the defendant argued that it did not violate its duty to provide a reasonably safe place to work because it warned both plaintiff and his employer of the high voltage electric current present in that area. *Mississippi Chemical Corp. v. Rogers,* 368 So.2d 220, 222 (Miss. 1979). In an effort to counter I.P.'s assertion that it had warned the plaintiff and provided a safe workplace, the plaintiffs' response to the motion for summary judgment asserted that the accident was caused by the combustion of airborne waste particles which had accumulated due to the negligence of I.P. In support of this industrial waste theory, the plaintiffs attached the affidavit of John Butters to their memorandum in opposition to summary judgment. The district court found the summary judgment proof showed that B.M. was warned of the high voltage present in the cabinet, that Russ was aware of this danger and that, under Mississippi law, I.P. had fulfilled its duty to a business invitee by providing a reasonably safe workplace and a warning of the dangerous electric current. In addition, it held that the affidavit offered to support the "industrial waste" theory did not meet the standards of FED.R.CIV.P. 56(e) and that plaintiffs had failed to produce any valid evidence to support the theory that his injuries were caused by anything other than the electrical current about which he had been warned.

III.

On appeal the plaintiffs make several claims regarding the propriety of the district court's grant of summary judgment. Russ does not question the district court's construction of the substantive state law. Rather the plaintiffs

argue that, under *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986), the district court impermissibly placed the burden of showing a material issue upon them. Plaintiffs argue that I.P. did not challenge the sufficiency of their evidence as to the cause of the accident in issue and thus the district court improperly granted summary judgment on that basis. The plaintiffs also argue that the district court erred in denying their motion to reconsider. The plaintiffs' proper construction of *Celotex* and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970), does not affect the district court's grant of summary judgment based on the record here. The denial of plaintiffs' motion to reconsider was not an abuse of discretion.

Summary Judgment

[1] Both the district court and I.P. cite language from the Supreme Court's decision in *Celotex* and other cases suggesting that summary judgment is appropriate anytime a party fails to establish the existence of an element essential to his case and on which he will bear the burden of proof at trial. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552; *Moore v. Mississippi Valley State Univ.*, 871, F.2d 545, 549 (5th Cir. 1989); *see also Washington v. Armstrong World Indus., Inc.*, 839 F.2d 1121, 1122 (5th Cir. 1988); *Brewster v. City of Dallas*, 703 F.Supp. 1260, 1263 (N.D. Tex. 1988). This is incorrect. The language in *Celotex* which states that a plaintiff opposing a summary judgment motion must "make a showing sufficient to establish the existence of an element essential to [their] case, and on which [they] will bear the burden of proof at trial," is cited out of context. These words do not fix the burdens each party must carry on a motion for summary judgment. Simply filing a summary judgment motion does not immediately compel the party opposing the motion to come forward

with evidence demonstrating material issues of fact as to every element of its case.

That this is a common misinterpretation of the Supreme Court decisions is amply demonstrated in the thorough opinion of Judge Cox, relying to some extent on 5th Circuit cases, in *Clark v. Coats & Clark, Inc.*, 929 F.2d 604 (11th Cir. 1991). The law of the Fifth Circuit and the Eleventh Circuit is identical in this regard.

Celotex makes clear that before the nonmoving party is required to produce evidence in opposition to the motion, the moving party must first satisfy its obligation of demonstrating that there are no factual issues warranting trial.

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex 477 U.S. at 323, 106 S.Ct. at 2553. The Court specifically approved its earlier decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159, 90 S.Ct. 1598, 1609, 26 L.Ed.2d 142 (1970), which stated that the party opposing a motion for summary judgment must respond only after the moving party meets its initial burden. *Celotex*, 477 U.S. at 325, 106 S.Ct. at 2554. This initial burden remains with the moving party even when the issue involved is one on which the non-movant will bear the burden of proof at trial. Contrary to the defendant's assertions, the Court in *Celotex* did not hold that any time a party with the burden of proof at trial is faced with a motion for summary judg-

ment it must come forward with competent evidence to support its theory of liability, regardless of what showing the movant has made.

[2] However, applying the proper construction of *Celotex* does not affect the district court's granted summary judgment on the record here. I.P. had the "burden of informing the court of the basis for its motion and identifying the pleadings and other record evidence which it believe[d] demonstrate[d] the absence of a genuine issue of material fact." *Howell Hydrocarbons, Inc. v. Adams,* 897 F.2d 183, 191 (5th Cir. 1990). I.P. pointed to two issues it contended were established in the record, either of which would be considered dispositive under Mississippi law - B.M.'s control of the electrical cabinet where Russ was working and the warning I.P. gave B.M. "Once that [was] done, it [was] incumbent upon the non-moving part[ies] to go beyond the pleadings and by affidavits of [their] own, or by the 'depositions answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* (quoting *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553). It was the plaintiffs' effort to go beyond the pleadings which the district court found insufficient.

[3] The plaintiffs' response to the motion for summary judgment which first developed the industrial-waste combustion theory was made in an effort to show that I.P.'s warning was not dispositive. Had plaintiffs put forth any valid Rule 56(e) evidence of their theory, the warning that electrical current was present in the area would not have warranted summary judgment. The plaintiffs did not designate specific facts to support their theory and thus show there was a genuine issue for trial. The only proof they offered was the affidavit of a person named John Butters, P.E. which stated in ambiguous terms that Russ was

"burned by an electrical discharge that resulted from surface contamination" which had accumulated in the cabinet in which Russ was working. The district court rejected this affidavit as insufficient because 1) it did not indicate any facts from which the district court could conclude that Butters was competent to testify as an expert, 2) the plaintiffs had failed to submit any authentical data on which Butters relied as required by FED.R.CIV.P. 56(e), and 3) because of the equivocal nature of the affidavit. The district court correctly concluded that Butters' affidavit was insufficient to support plaintiffs' theory.

Until the plaintiffs' response to I.P.'s summary judgment motion, this industrial waste theory was neither articulated or evident from the record. Their complaint states that Russ was "enveloped by a ball of fire" and in the pleadings, the plaintiffs referred to the accident as an "explosion." Russ's deposition stated that he was drilling holes in the electrical cabinet the day before the accident and that, on the day of the accident, he was attempting to attach a "flex line" to the cabinet when suddenly everything turned bright orange. He had no idea how the fire occurred save what his lawyer told him. None of these unsupported statements that his injuries were not the result of mishandling of the electrical current Russ knew was present. They do not establish the industrial-waste combustion theory later articulated in response to the motion for summary judgment.

The plaintiffs argue that I.P. should have been on notice that such a theory of causation was in issue since plaintiffs had designated two experts to testify at trial. However, the plaintiffs' experts were not designated until two months after I.P. filed its motion for summary judgment, four days after plaintiffs filed their response, and only eleven days before the district court granted the motion.

Even then, the persons named were not specified as expert on this theory of causation. In their brief to this court, the plaintiffs also point to the fact that Russ was seriously burned over a large portion of his body and point out that such injuries are indicative of an explosion rather than of electrical shock. Although the plaintiffs' response to the motion for summary judgment asserted Russ's burns demonstrated I.P.'s negligence, they never asserted that such burns were record proof of their industrial waste theory.

Under the facts properly developed in the summary judgment record, I.P. had no burden to show that causation was a material issue. The plaintiffs attempted to defeat I.P.'s specific assertions of the patently dispositive issue of warning by suggesting a theory of causation which was outside of that warning. The district court correctly evaluated the insufficiency of the evidence which plaintiff offered to support this counter theory.

Motion to Reconsider

[4] The plaintiffs filed a motion to reconsider after the district court entered summary judgment. They attached to their motion the affidavit of George Hero which supports their industrial waste theory and was not subject to the insufficiencies of Butters' affidavit. The district court construed the motion to reconsider as a motion to alter or amend under Federal Rule of Civil Procedure 59(e). The court concluded that the plaintiffs could not repair their deficient summary judgment proof under Rule 59(e) and that denying the motion was not manifestly unjust. Plaintiffs argue before us that the court should have granted the motion because of the "clear error" in its ruling and the resulting manifest injustice of the district court's decision. We disagree.

In *DeLong Corp. v. Raymond Int'l, Inc.*, 622 F.2d 1135 (3rd Cir. 1980), the Third Circuit examined a similar claim. In that case, the plaintiff submitted no affidavits or summary judgment proof to counter the defendants' motion for summary judgment which was granted by the district court. The plaintiff moved to reconsider and submitted affidavits and other documents to support the motion. The district court denied the motion. On appeal the Third Circuit affirmed. The court reasoned that the unexcused failure to present evidence which is available at the time summary judgment is under consideration constituted a valid basis for denying a motion to reconsider.

In this case, Hero was designated as an expert witness by the plaintiffs prior to entry of summary judgment. All the information on which his affidavit relies was obviously available to plaintiffs prior to that time. The plaintiffs make no claim that Hero's affidavit was unavailable at a time when it should have been presented. The district court's conclusion that the plaintiffs should not be permitted to remedy their proof on summary judgment in this manner is not an abuse of its discretion.

The judgment appealed from is

AFFIRMED.

RONEY, Senior Circuit Judge,

dissenting:

I respectfully dissent. While I agree with the exposition of summary judgment law in the Court's opinion, I think those standards were misapplied by the district court in this case.

Plaintiff asserts that the injuries he suffered were caused "by a ball of fire," the combustion of airborne waste particles which had accumulated due to negligent maintenance. The defendant moved for summary judgment on the ground that it warned both plaintiff and his employer of the high voltage electric current present in that area. *Mississippi Chemical Corp. v. Rogers*, 368 So.2d. 220, 222 (Miss. 1979). This warning would not insulate the defendant from liability if the high voltage warned of was not the sole cause of plaintiff's injuries. The defendant does not allege that it warned plaintiff of high voltage electricity *plus* a contaminated work place that would create a dangerous ball of fire.

The district court concluded that there was insufficient evidence to support the plaintiff's theory regarding the cause of the injury. But before the plaintiff was required to make any showing, the defendant was required to show there was no issue of fact that it *warned* the plaintiff of *cause* of the injury. Although plaintiff admits the warning, the defendant failed to point to a record that shows without question that plaintiff was injured by high voltage alone.

A review of the record reveals that the district court was in all likelihood correct in concluding that the plaintiff had failed to produce sufficient evidence to demonstrate that a ball of fire, rather than electric current, caused his injuries. In fact, the plaintiff virtually admits that the record is devoid of evidence demonstrating that the fire was caused by the combustion of airborne particles. But the defendant did not move for summary judgment on the ground that plaintiff could not prove his alleged cause of injury, as was the case in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

The plaintiff correctly argues on appeal that he was never given adequate notice that causation was in issue. Thus, the burden never shifted to the plaintiff to support his theory. The plaintiff's response to the defendant's motion for summary judgment reflects this fact by addressing only the arguments advanced by the defendant and demonstrating to the court that even if true the defendant's arguments would not necessitate a judgment in defendant's favor.

Only in defendant's reply to the plaintiff's response did the defendant suggest that the record did not contain evidence to support the plaintiff's view. "In his response to the Motion for Summary Judgment, Russ has wholly failed to make out a prima facie case of negligence against International Paper Company, and therefore, summary judgment for International Paper Company is proper." Raising this argument at this juncture suggests a misunderstanding of the proper placement of burdens in a summary judgment proceeding. The opposing party has no obligation to produce evidence concerning an argument that has not been raised. In *Celotex,* Justice White, who supplied the majority's fifth vote, noted in his concurring opinion that "[i]t is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case." *Celotex,* 477 U.S. at 328, 106 S.Ct. at 2555 (White, J., concurring); *Galindo v. Precision American Corp.,* 754 F.2d 1212, 1221 (5th Cir. 1985) (conclusory statements of law or fact are not sufficient to shift summary judgment burden).

I would vacate the judgment and remand the case to the district court to apply the summary judgment principles set forth in this Court's opinion. If the defendant chooses to ground a motion for summary judgment on the

cause of the injuries and can meet its burden of demonstrating the parts of the record which support that motion, then the plaintiff should be given the opportunity to rebut the case with a showing of triable issues of material fact.

APPENDIX "D"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-1445

JEFFREY G. RUSS and SHANNON C. RUSS,
Plaintiffs-Appellants,

versus

INTERNATIONAL PAPER COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion 10-07-91, 5 Cir., 199__, _____F.2d____)

(November 13, 1991)

Before CLARK, RONEY*, and DUHE', Circuit Judges.

* Circuit Judge of the Eleventh Circuit, sitting by designation.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is denied.

ENTERED FOR THE COURT:

_____

CHIEF JUDGE